BEFORE THE APPEALS BOARD
FOR THE
KANSAS DIVISION OF WORKERS COMPENSATION

JARED K. DINWIDDIE	)	
Claimant	)	
VS.	)	
	)	Docket No. 1,054,309
CITY OF WICHITA	)	
Respondent/Self-Insured	)	
	)	

ORDER

Respondent requested review of the August 23, 2012 Award by Administrative Law Judge (ALJ) Nelsonna Potts Barnes. The Board heard oral argument on January 9, 2013. Joni J. Franklin, of Wichita, Kansas, appeared for claimant. Edward D. Heath, Jr., of Wichita, Kansas, appeared for respondent and its insurance carrier (respondent).

Judge Barnes found claimant sustained a 15% whole body functional impairment, utilizing the only rating in evidence, which was from Pedro Murati, M.D. Claimant was awarded permanent partial disability benefits in the amount of $33,926.25.

The Board has adopted the stipulations listed in the Award.

ISSUES

Respondent requests review of Judge Barnes' Award and argues claimant's accident did not arise out of and in the course of his employment and claimant failed to provide timely notice.

Claimant requests the Board affirm Judge Barnes' Award.

The issues before the Board are:

(1) Did claimant meet with personal injury arising out of and in the course of his employment on or about December 31, 2010, and each and every working day thereafter?

(2) Did claimant provide timely notice to the respondent?

(3) Is respondent responsible for payment of claimant's medical expenses?

FINDINGS OF FACT

Claimant has worked as a firefighter for respondent since July 13, 2003. On December 31, 2010, claimant was dispatched to a house fire. He wore full protective equipment weighing approximately 80 pounds, including SCBA (self-contained breathing apparatus) gear, and operated a water hose. As the fire wound down, he asked someone named Lieutenant McBee if he could take off the air pack due to lower left back discomfort. Claimant admittedly did not consider his comment to be the reporting of an accident.

Claimant worked his normal shifts (24 hours on, 48 hours off) from December 31, 2010 to January 16, 2011. He continued to have consistent pain in his lower left back and pain that radiated into his left groin from December 31, 2010 forward. Claimant did not fill out an accident report or seek medical treatment. He thought he had a mild muscle strain or cramp that would resolve like similar back strains he had in the past.

Claimant had no low back treatment between December 31, 2010 and January 16, 2011. He did not work on January 16, 2011. That evening, claimant was at home when he bent over or bent at the knees before leaning forward to move his dog when he experienced an extreme stabbing sensation in his lower left back. He did not touch or lift his dog; he experienced his symptoms when he was bent over about half way. He was unable to move, stand up straight without significant pain or drive. He called his wife, who called for an ambulance.

The Clearwater Emergency Medical Service report stated claimant was squatting down to "mess" with his dog and had sudden onset of sharp, stabbing lower back pain radiating down his left leg.[1] Claimant reported no trauma. Claimant was transported to Wesley Medical Center. Several records comment on causation:

- The"Wesley Medical Center EMS Report Form" noted claimant had no history of back problems and was injured when squatting over.[2]
- The "Inpatient Record" contained no mention of a work accident or injury.[3]
- The "Emergency Physician Record" stated: "Pt stated he was squatting & had sudden sharp pain in back. Denies any other injury."[4]

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[1] Grundmeyer depo., Ex. 3 at 253.

[2] *Id.*, Ex. 3 at 252.

[3] *Id.*, Ex. 3 at 214.

[4] *Id.*, Ex. 3 at 241.

- The "History & Physical" stated claimant was "squatting down to move his dog and felt an intense pain."[5]

- A document titled "Imaging Services Patient History" noted claimant had no known injury and felt a pop when squatting.[6]

- A "Handoff Report" noted claimant was "squatting down to play with dog" when suddenly injured, but also noted prior groin pain for about a week.[7]

A January 17, 2011 "Clinical Documentation Record" stated claimant "was squatting down while feeding his dogs and 'something gave.'"[8] Another January 17, 2011 "Clinical Documentation Record" stated claimant had onset of pain on January 16, 2011 and no history of back pain.[9] Dr. Doug Nunamaker's handwritten January 17, 2011 report noted claimant's low back pain"started this evening" when he "squatted down to move dog."[10]

A January 17, 2011 MRI showed a herniated disk at L3-4. A January 18, 2011 "Consultation Report" from Dr. Michael L. Heaney indicated claimant had a "several month history of minor low back pain that occasionally radiated into his left groin. This was intermittent and not too serious until last Sunday when he squatted down and developed severe pain radiating from his back into his left groin and testicle and down his anterior thigh to the knee and occasionally the calf."[11]

Raymond W. Grundmeyer, III, M.D., a board certified neurosurgeon, also examined claimant on January 18, 2011. Dr. Grundmeyer's handwritten notes indicated claimant's low back and sudden leg and groin pain started when he was "squatting down to pet his dog."[12] Dr. Grundmeyer's typed January 18, 2011 report noted claimant's low back pain "started the evening of admission when he squatted down to move his dog."[13]

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[5] *Id.*, Ex. 3 at 239.

[6] *Id.*, Ex. 3 at 235.

[7] *Id.*, Ex. 3 at 229. This footnote and the prior six footnotes all reference documents from Wesley Medical Center dated January 16, 2011.

[8] *Id.*, Ex. 3 at 68.

[9] *Id.*, Ex. 3 at 70.

[10] *Id.*, Ex. 3 at 153.

[11] *Id.*, Ex. 3 at 210.

[12] *Id.*, Ex. 3 at 154.

[13] *Id.*, Ex. 3 at 204.

Dr. Grundmeyer diagnosed claimant with an acute left L3 radiculopathy with left lateral L3-4 disk herniation. Dr. Grundmeyer recommended an epidural selective nerve root block at L3-4 followed by a microdiskectomy if there was no improvement. On January 19, 2011, claimant received an epidural steroid injection at L3-4. The injection did not improve claimant's pain. Dr. Grundmeyer performed a left lumbar L3-4 microdiskectomy on January 21, 2011.

Claimant testified Dr. Grundmeyer told him, prior to surgery, that there was a good possibility that his work activities caused his back injury.

Claimant was discharged from Wesley Medical Center on January 23, 2011 and instructed not to return to work. The "Discharge Summary" noted claimant "bent down to lift his dog up off the floor and felt a pop in his back followed by significant pain with pain radiating into the left anterior thigh."[14]

None of the Wesley Medical Center records make reference to claimant being involved in a work-related accidental injury.

On January 26, 2011, claimant completed an accident report and the following written explanation:

> In response to the prolonged filing of my accident report from alarm #10-0056511; at the time of the incident, the pain that I was experiencing seemed no more than the usual type of discomfort that one would experience while wearing an SCBA for a prolonged amount of time. The following day most of the discomfort and pain in my lower back had subsided, but I was still experiencing some discomfort in the inner groin area and slight discomfort in the lower back. I merely thought of this as a usual strain or pull of the muscle. It was not until later on when my disc went out, and required surgery, that I realized that I may have had a more serious injury from that alarm than I thought. The fire on 12-31-10 is the only incident I can recall where I first started experiencing this discomfort due to the prolonged use of an SCBA.[15]

Claimant returned to Dr. Grundmeyer for a post-op visit on March 9, 2011. A form titled "Health History," signed by claimant, indicated he was not there for a work-related injury. Claimant reported no pain. Dr. Grundmeyer advised claimant to work as tolerated and to be cautious with repetitive bending, twisting and lifting. Dr. Grundmeyer's "Work Release" indicated claimant had no restrictions. Since that time, claimant has continued to work for respondent without low back restrictions.

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[14] *Id.*, Ex. 3 at 1.

[15] R.H. Trans., Cl. Ex. 2 at 2-3 & Cl. Ex. 3.

On May 4, 2011, Dr. Grundmeyer signed a document prepared by claimant's attorney in which he agreed claimant's work activities as a firefighter, including performing multiple functions at a house fire and wearing a self-contained breathing apparatus, on or about December 31, 2010 and continuing through January 21, 2011, more probably than not worsened or aggravated his back condition and caused his need for medical treatment.

At the request of claimant's attorney, Dr. Pedro A. Murati, M.D., examined claimant on July 20, 2011. Dr. Murati diagnosed claimant with status post left lumbar L3-4 microdiskectomy. Dr. Murati rated claimant as having a 15% permanent partial impairment to the body as a whole under the AMA *Guides to the Evaluation of Permanent Impairment (4th ed.).* Dr. Murati attributed claimant's impairment to a December 31, 2010 accident from wearing firefighting equipment.

Dr. Grundmeyer testified on March 28, 2012, as follows:

> Q. In that opinion you opined that the incidents that happened on 12/31 of 2010 and continuing with the firefighting duties of Mr. Dinwiddie did more probably than not worsen or aggravate his back condition and the need for the medical intervention that you provided. Did I read that accurately?
>
> A. Yes.
>
> Q. Now, in making that decision, Doctor, is it fair to say that you reviewed an accident report filled out by Mr. Dinwiddie that has been admitted in his Regular Hearing as Claimant's Exhibit No. 2? Do you remember reviewing that information?
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> A. Vaguely, but, yes, I do.
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> Q. And in that it described him wearing the self-contained breathing apparatus, his SCBA, as well as the firefighting duties that he had, and some pain that it started to cause in his low back and inner groin area; is that correct?
>
> A. Yes.
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> Q. . . . What did that information tell you in the reaching of your opinion that it was causally related to this lower back injury?
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> A. Well, within a short period of time from the time he had this sudden radiculopathy, meaning the nerve root pain, within a short period of time he had already had an injury that aggravated his lower back. And so if this had happened a year earlier, I would say then probably not related. But it didn't happen a year earlier, it happened – I don't know – it was 12/31 and he was admitted to the hospital 1/18, so really within – within a month of this injury he's having these symptoms, so that's why I feel more probable than not it's related to the accident. It just got dramatically worse on that particular day.

> Q. Mr. Dinwiddie testified in his Regular Hearing that on 1/16 he was in his home, bending at the knees – and I believe I had you review that testimony at page 30 of his Regular Hearing – bending at the knees and bending at the waist at a 30-degree angle, attempting to reach down to pet his dog or move his dog, but didn't get there because the pain started severely. Even with the onset of the pain at home on 1/16, is it still your opinion that the events that started on 12/31 of 2010 during his firefighting duties is causally related to the injury to his lower back?
>
> A. Yes.
>
> Q. I also had you review his court testimony from the Regular Hearing, pages 9 through 12, where he specifically described the firefighting duties that he underwent on 12/31/2010. Is that consistent with your opinion that again those duties would have aggravated the back condition or been causally related to the back condition that you have treated?
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> A. Well, without knowing the specifics of firefighting, it seems like it's labor – generally a labor-intensive activity just like construction or other ones, but a labor-intensive activity, and that during that activity he describes that's when he started having lower back pain. Again, because of the temporal relationship, several weeks, you know, approximately three weeks later, two to three weeks and then all of a sudden it gets significantly worse, I believe there's a relationship between the two. I think pretty clear.[16]

Dr. Grundmeyer was told the Wesley Medical Center records indicated claimant's symptoms started after the January 16, 2011 incident at home with his dog, but he testified claimant started having symptoms on December 31, 2010 that got worse thereafter:

> I kind of look at a back problem like this, it's kind of like you accidentally hit the curb with your car. Your tire, you look – oh, well, maybe I did something and you keep driving and you're like, okay, this is okay, but you hear something funny and then the next day you look and, well, yeah, you've bent your rim and your tire's flat. You made it home, you are able to get by for a while, but it was not because you drove into the garage wrong and maybe finally that was the last thing to push it over the edge, but the injury occurred when you really hit the curb with the car.[17]

Even though the Wesley Medical Center records do not state claimant was injured as a result of his work, Dr. Grundmeyer still testified claimant's injury was consistent with his physically-demanding firefighting duties starting on December 31, 2010.[18]

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[16] *Id.* at 8-11.

[17] *Id.* at 16.

[18] *Id.* at 26, 28.

Dr. Murati testified on March 29, 2012. He compared the claimant's January 16, 2011 event at home as "the last drop that spilled the drink."[19] Dr. Murati testified as follows:

> Q. Now, back to the information I was asking you before, based upon the history you were given by [claimant] of the problems that he began experiencing in his back on 12/31 of 2010 that were indicated in the medical records provided to you, and the fact that he did not go to the hospital until 1/16 when he began having an increase of pain at home and was transported via ambulance, would that change in regards to your opinion of the impairment being related to the work-related injury?
>
> A. No, it's still work-related.[20]

Dr. Murati opined claimant's disc herniation was causally related to his work activities on December 31, 2010, even though respondent's counsel pointed out:

- claimant was able to work his regular shifts between December 31, 2010 and January 16, 2011;
- the Wesley Medical Center records contained no mention that claimant was injured while fighting a fire on December 31, 2010; and
- claimant had extreme pain on January 16, 2011, as a result of squatting at home, requiring that he be transported by ambulance to the hospital.

Prior to his low back injury, claimant had an ongoing workers compensation claim involving his knee. He filled out an accident report and was examined by a workers compensation doctor. Claimant testified his low back injury was different because his knee injury did not result in him being transported by ambulance to a hospital, plus the low back injury resulted in more pain and scared him.[21]

Judge Barnes ruled claimant sustained personal injury arising out of and in the course of his employment beginning on December 31, 2010 and continuing as a series of accidental injuries through January 16, 2011. She did not issue a specific ruling regarding notice, but she impliedly found notice was satisfied, insofar as she found the case compensable. She ordered respondent responsible for all of claimant's related medical bills.

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[19] *Id.* at 20.

[20] Murati Depo. at 15-16.

[21] R.H. Trans. at 24-25.

PRINCIPLES OF LAW

An employer is liable to pay compensation to an employee where the employee incurs personal injury by accident arising out of and in the course of employment.[22] Whether an accident arises out of and in the course of the worker's employment depends upon the facts peculiar to the particular case.[23]

The two phrases arising "out of" and "in the course of" employment, as used in the Kansas Workers Compensation Act, have separate and distinct meanings; they are conjunctive, and each condition must exist before compensation is allowable.

> The phrase "out of" employment points to the cause or origin of the accident and requires some causal connection between the accidental injury and the employment. An injury arises "out of" employment when there is apparent to the rational mind, upon consideration of all the circumstances, a causal connection between the conditions under which the work is required to be performed and the resulting injury. Thus, an injury arises "out of" employment if it arises out of the nature, conditions, obligations, and incidents of the employment. The phrase "in the course of" employment relates to the time, place, and circumstances under which the accident occurred and means the injury happened while the worker was at work in the employer's service.[24]

> If in any employment to which the workers compensation act applies, personal injury by accident arising out of and in the course of employment is caused to an employee, the employer shall be liable to pay compensation to the employee in accordance with the provisions of the workers compensation act. In proceedings under the workers compensation act, the burden of proof shall be on the claimant to establish the claimant's right to an award of compensation and to prove the various conditions on which the claimant's right depends. In determining whether the claimant has satisfied this burden of proof, the trier of fact shall consider the whole record.[25]

> "Accident" means an undesigned, sudden and unexpected event or events, usually of an afflictive or unfortunate nature and often, but not necessarily, accompanied by a manifestation of force. The elements of an accident, as stated herein, are not to be construed in a strict and literal sense, but in a manner designed to effectuate the purpose of the workers compensation act that the employer bear the expense of accidental injury to a worker caused by the employment. In cases where the

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[22] K.S.A. 2010 Supp. 44-501(a).

[23] *Kindel v. Ferco Rental, Inc.*, 258 Kan. 272, 278, 899 P.2d 1058 (1995).

[24] *Id.*

[25] K.S.A. 2010 Supp. 44-501(a).

> accident occurs as a result of a series of events, repetitive use, cumulative traumas or microtraumas, the date of accident shall be the date the authorized physician takes the employee off work due to the condition or restricts the employee from performing the work which is the cause of the condition. In the event the worker is not taken off work or restricted as above described, then the date of injury shall be the earliest of the following dates: (1) The date upon which the employee gives written notice to the employer of the injury; or (2) the date the condition is diagnosed as work related, provided such fact is communicated in writing to the injured worker. In cases where none of the above criteria are met, then the date of accident shall be determined by the administrative law judge based on all the evidence and circumstances; and in no event shall the date of accident be the date of, or the day before the regular hearing. Nothing in this subsection shall be construed to preclude a worker's right to make a claim for aggravation of injuries under the workers compensation act.[26]
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> "Burden of proof" means the burden of a party to persuade the trier of facts by a preponderance of the credible evidence that such party's position on an issue is more probably true than not true on the basis of the whole record.[27]

ANALYSIS

This case boils down to whether claimant's low back injury was caused by his job duties or from bending toward his dog at home on January 16, 2011.

The majority of the Appeals Board concludes Judge Barnes' Award should be reversed. Claimant thought he had a mild low back strain on December 31, 2010. Contemporaneous medical records, including those from Dr. Grundmeyer, say nothing about a work accident or work duties causing claimant's injury. The history of injury contained in the medical records point to one cause – claimant's January 16, 2011 incident with his dog. The same history is noted on perhaps as many as one dozen occasions. The first indication of a work injury in the medical records is Dr. Grundmeyer's opinion dated May 4, 2011, in which he agreed – on a form completed by claimant's attorney – that claimant was injured as alleged.

The evidence is lacking that claimant sustained a series of accidental injuries from December 31, 2010 through January 16, 2011. Claimant worked his regular job and sought no medical treatment during this time. Claimant testified he had continued pain. Continued pain is not synonymous with work duties causing ongoing accidental injury. Claimant's own accident report only points to one incident occurring on December 31, 2010, not a series of accidental injuries. Dr. Murati pointed to the singular event on March 31, 2010 as causing claimant's injury. Dr. Grundmeyer's May 4, 2011 opinion that

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[26] K.S.A. 2010 Supp. 44-508(d).

[27] K.S.A. 2010 Supp. 44-508(g).

claimant's continuing job duties caused injury lacks support when considering: (1) claimant never testified that his ongoing job duties caused any worsening; (2) Dr. Grundmeyer admittedly did not know the specifics of firefighting; and (3) the medical records contemporaneous with the injury only focus on the incident with claimant's dog.

Claimant was familiar with the workers compensation system. He had an ongoing knee claim at the time of his asserted low back injury. He completed an accident report, was evaluated by a workers compensation doctor and he processed his knee injury bills through's respondent's workers compensation insurance. This protocol did not occur with claimant's back injury, where he obtained treatment on his own, outside the workers compensation system, processed medical bills associated with his low back through his health insurance, and belatedly completed an accident report.

Given this conclusion, the issues regarding notice and medical bills are moot.

CONCLUSIONS

The Appeals Board finds the Award of the Judge Barnes should be reversed. Claimant sustained personal injury by accident arising out of and in the course of his employment on December 31, 2010. Claimant did not prove a series of accidental injuries thereafter. Claimant sustained an intervening accidental injury at home on January 16, 2011, when he bent over toward his dog.

AWARD

WHEREFORE, the Appeals Board reverses Administrative Law Judge Nelsonna Potts Barnes' August 23, 2012 Award.

IT IS SO ORDERED.

Dated this _____ day of January, 2013.

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BOARD MEMBER

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BOARD MEMBER

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BOARD MEMBER

DISSENT

The undersigned Board Member dissents from the majority opinion.

Drs. Grundmeyer and Murati were alerted to various flaws in claimant's case, such as the lack of treatment records showing a work-related cause. Both physicians nonetheless opined claimant's work duties caused his low back injury and need for surgery. No medical expert provided a contrary opinion. In essence, the majority is ignoring uncontradicted expert medical evidence. "Uncontradicted evidence which is not improbable or unreasonable cannot be disregarded unless shown to be untrustworthy, and is ordinarily regarded as conclusive."[28] This Appeals Board member agrees with the testimony of the two expert medical opinions.

Claimant testified without contradiction that Dr. Grundmeyer told him, just before surgery, that there was a good possibility that his work activities caused his back injury. While respondent argues Dr. Grundmeyer denied any such conversation, he actually testified that he did not ask claimant his profession or his job duties at the time of their *initial* consultation, which occurred on January 18, several days before the January 21, 2011 surgery.[29] Dr. Grundmeyer never denied that he and claimant may have discussed whether claimant's strenuous firefighting duties caused claimant's low back injury.

The fact that claimant again advised respondent, after his discharge, that he had been hurt while performing work duties, is generally consistent with his contention that Dr. Grundmeyer told him just before surgery that his job duties may have caused his injury.

Judge Barnes found claimant sustained a series of accidental injuries with an accident date of January 16, 2011. Such accident date does not comport with K.S.A. 2010 Supp. 44-508(d). Claimant's accident date under the application of such statute is January 26, 2011, which was when he gave written notice to respondent of the injury.[30]

This Appeals Board member would find claimant provided notice of an accident on both December 31, 2010, when claimant complained to Lieutenant McBee that wearing his heavy firefighting gear was causing him low back pain, as well as on January 26, 2011, when he gave written documentation of his accident to respondent.

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[28] *Anderson v. Kinsley Sand & Gravel, Inc.*, 221 Kan. 191, 197, 558 P.2d 146, 151 (1976).

[29] Grundmeyer depo. at 14-15, 18.

[30] See *Saylor v. Westar Energy, Inc.*, 292 Kan. 610, 256 P.3d 828 (2011) ("[T]he assignment of any single date as the "accident date" for a repetitive use/cumulative traumas injury is inherently artificial and represents a legal question, rather than a factual determination.")

This Appeals Board member would find respondent not responsible for payment of claimant's medical bills. This case is not like *Saylor*, where "there was substantial competent evidence to support the Board's finding that Westar had knowledge of Saylor's work-related injury on February 6, 2006, and that Westar refused or neglected to provide medical treatment for that injury."[31]

This is not a situation where claimant reported an injury and requested medical treatment, only to have respondent do very little or nothing.[32] Prior to claimant's hospitalization and surgery, respondent's knowledge of injury was limited to claimant saying his back was sore on December 31, 2010. Respondent did not refuse or neglect to provide medical treatment that occurred three weeks later, as there was no indication claimant required any medical treatment.

A similar issue regarding a similar medical treatment procedure was addressed in *Thompson*,[33] wherein the Kansas Court of Appeals stated:

> Although K.S.A. 2010 Supp. 44-510h(a) establishes an employer's general duty to provide medical care for an injured employee, there is no provision requiring an employer or an employer's insurance carrier to pay for the medical expenses incurred solely at the employee's discretion. To the contrary, K.S.A. 2010 Supp. 44-510h(b)(2) states:
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> > "Without application or approval, an employee may consult a health care provider of the employee's choice for the purpose of examination, diagnosis or treatment, but the employer shall only be liable for the fees and charges of such health care provider up to a total amount of $500." K.S.A. 2010 Supp. 44-510h(b)(2).
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> . . . The Act makes no other provision for emergency treatment other than to charge the first $500 of such treatment to the employer under K.S.A. 2010 Supp. 44-510h(b)(2). Consequently, the Board erred, as a matter of law, in authorizing compensation for the unauthorized hospital bill in excess of the $500 limit provided by K.S.A. 2010 Supp. 44-510h(b)(2).

This Board Member would find respondent not responsible for claimant's unauthorized medical bills other than paying the statutory $500 for unauthorized medical.

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[31] *Saylor v. Westar Energy, Inc.*, 292 Kan. 610, 623, 256 P.3d 828, 837 (2011).

[32] See *Smith v. Sophie's Catering & Deli Inc.*, No. 99,713, 202 P.3d 108 (Kansas Court of Appeals unpublished opinion filed Mar. 6, 2009); see also *Wells v. Waffle House, Inc.*, No. 91,334, 95 P.3d 136 (Kansas Court of Appeals unpublished opinion filed Aug. 13, 2004).

[33] *Thompson v. Hasty Awards, Inc.*, No. 106,359, 277 P.3d 447 (Kansas Court of Appeals unpublished opinion filed May 25, 2012).

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BOARD MEMBER

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Honorable Nelsonna Potts Barnes